

APPEAL NO. 010088-S

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 6, 2000, a hearing was held. On the sole issue, the hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) did not become final under Tex. W.C. Comm'n 28 TEX. ADMIN. CODE § 130.5(e)(Rule 130.5(e)), because the respondent (claimant) did not receive written notice of the certification and disputed the certification within 90 days of receiving verbal notice. The appellant (carrier) urges reversal of the hearing officer's decision, asserting that it is against the great weight of the evidence and contrary to the law regarding receipt of notice for purposes of Rule 130.5(e). No response was filed.

DECISION

We affirm.

On _____, the claimant sustained a compensable injury and was treated by Dr. S. On October 14, 1999, Dr. S certified that the claimant reached MMI on September 27, 1999, with an IR of zero percent. This was the first certification of MMI/IR. The Texas Workers' Compensation Commission's (Commission) records reflect written notice (EES-19) of Dr. S's certification was mailed to the claimant at (address 1), Texas, on October 28, 1999. In an affidavit, the carrier's adjuster states that on December 3, 1999, a Notification Regarding Maximum Medical Improvement and/or Impairment Rating (TWCC-28) was mailed to the claimant at (address 2), Texas, which included a copy of Dr. S's certification. The carrier's adjuster further stated that the written notice was not returned by the United States Post Office.

The claimant has resided at address 2 for the past 12 years. The claimant testified that she did not receive the written notices mailed by the Commission or the carrier, but that she had received some prior correspondence which had been addressed to her at address 1, although she did not notice the incorrect address at the time. The claimant further testified that she first became aware of Dr. S's certification on or about July 10, 2000, when speaking to the carrier's adjuster over the telephone. Additionally, in a written statement dated September 8, 2000, the claimant states that she had not received written notice of the certification as of that date. Notwithstanding, Commission records reflect that the claimant disputed Dr. S's certification on August 3 and 15, 2000, and September 12, 2000.

The hearing officer did not err in determining that the first certification of MMI and IR did not become final under Rule 130.5(e). The version of Rule 130.5(e) in effect at the time MMI/IR was certified provided that the first IR assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned. We have held that the 90-day deadline for disputing IR does not run from the date a doctor issues a report, but from the date the parties are notified of the rating. Texas Workers'

Compensation Commission Appeal No. 93501, decided August 2, 1993. We have also held that certification of MMI/IR and the communication of the same to the parties under Rule 130.5(e) requires a writing. Texas Workers' Compensation Commission Appeal No. 94354, decided May 10, 1994.

Written communications sent by the Commission will be deemed received five days after the date mailed, unless the great weight of the evidence indicates otherwise. Rule 102.5(d) (effective August 29, 1999). We have held that the rule will not apply where a party fails to receive a decision because it was mailed to the wrong address or because of postal error. Texas Workers' Compensation Commission Appeal No. 94517, decided June 14, 1994. With regard to written communications sent between parties, we have said that mail properly placed in the postal system is presumed received. Texas Workers' Compensation Commission Appeal No. 970650, decided May 29, 1997. The evidence shows that the Commission mailed an EES-19 letter to the claimant at the wrong address. Additionally, there is no documentary evidence that the carrier mailed notice of Dr. S's certification to the claimant, other than an affidavit which states that the wrong address was used. The claimant, therefore, cannot be deemed to have received written notice of Dr. S's certification by either the Commission or the carrier. Furthermore, we cannot conclude that the hearing officer's determination that the first MMI/IR certification did not become final is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Because Dr. S's certification did not become final under the version of Rule 130.5(e) then in effect, we must now consider whether it has become final under the rule as amended on March 13, 2000. See Rule 130.5(f) (effective March 13, 2000) stating that the amended rule applies to certifications of MMI and IR that did not become final prior to the effective date of the amendment. Rule 130.5(e) now provides, in pertinent part, that the first certification of MMI and IR assigned to an employee is final if the certification is not disputed within 90 days after *written notification of the MMI/IR is sent by the Commission to the parties*. As stated above, the evidence shows that the Commission sent written notice of Dr. S's certification to the claimant at the wrong address. The claimant's street address was transposed. Given these facts, we cannot conclude that the 90-day period, under amended Rule 130.5(e), was triggered by the Commission letter of October 28, 1999. (See Texas Workers' Compensation Commission Appeal No. 002905-S, decided February 1, 2001, regarding computation of the 90-day period under the amended Rule 130.5(e)). Accordingly, the hearing officer's determination, with regard to amended Rule 130.5(e), that Dr. S's certification did not become final is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, *supra*.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge